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91-1739

No.

Supreme Court, U.S.
FILED
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In The

**SUPREME COURT OF THE UNITED STATES**

October Term, 1991

GEORGE GROUND, *et al.*,

*Petitioners,*

*v.*

BRIAN BARLOW,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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97+ f/o

## QUESTIONS PRESENTED

1. Is the warrantless taking of a blood sample justified by the need to protect and preserve life, when an individual who admits he is homosexual and indicates that he may be infected with the AIDS virus intentionally bites two police officers while resisting a lawful detention, drawing blood from each?

2. Would a reasonable officer have believed, in June, 1986, that taking a warrantless blood sample from an individual who had bitten two police officers, and who indicated that he may have AIDS, was not clearly unconstitutional, so that qualified immunity applies?

3. When police observe an individual engaged in apparently criminal conduct, objectively sufficient to support probable cause that the individual has committed vandalism and battery, are they protected by qualified immunity for detaining or arresting him despite the fact that he may have an innocent explanation for his behavior?

4. Is summary judgment proper on the issue of excessive force, where no evidence was presented in opposition to the Motion for Summary Judgment on that issue, and nothing in the record indicates that more force than necessary was used, or that any injured occurred?

## PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Raymond Shay, Leslie Oberlies, James Arthur, Robert Evans and the City of San Diego were defendants and appellees in this case.

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No.

In The

**SUPREME COURT OF THE UNITED STATES**

October Term, 1991

GEORGE GROUND, *et al.*,

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*v.*

BRIAN BARLOW,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

Petitioners, George Ground, Raymond Shay, Leslie Oberlies, James Arthur, Robert Evans, and the City of San Diego respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings on September 5, 1991.

## OPINIONS BELOW

The Opinion of the United States Court of Appeal for the Ninth Circuit, published at 943 F.2d 1132, is reprinted and attached as Appendix "B".

The Memorandum Opinion of the United States District Court, Southern District of California, the Honorable J. Lawrence Irving, Judge, has not been reported. It is reprinted and attached as Appendix "D".

## JURISDICTION

The Opinion and Judgment sought to be reviewed is the Opinion of the United States Court of Appeal for the Ninth Circuit, published at 943 F.2d 1132, which was entered on September 5, 1991.

A timely Motion for Rehearing was filed on September 19, 1991. Rehearing was denied on February 5, 1992, by Order which is reprinted and attached as Appendix "A".

The jurisdiction of this Court to review a judgment of a United States Court of Appeal is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

On June 7, 1986, Brian Barlow participated in a gay pride parade held in San Diego, California. During the parade, Barlow was contacted by San Diego Police Detective Les Oberlies after he had received complaints from bystanders that Barlow had sprayed them with water from a bottle he was carrying. Oberlies asked Barlow to step to the side of the parade route, and admonished him for his conduct. (App., D-2).

San Diego Police Officers George Ground and James Arthur observed that Barlow was looking at the sky arrogantly appearing to ignore Oberlies' admonishment. When Barlow was released back into the parade, Officers Ground and Arthur watched as Barlow ran through a group of protesters, grabbed a sign from a young woman, Michelle Skinner, tore the sign off the stick and threw it to the ground. (App. D-2, D-3).

All witnesses report seeing Barlow knock down Michelle Skinner's sign, and Mrs. Skinner states that it was, in fact, torn from the stick and thrown to the ground. Barlow admits that he knocked the sign to the ground, and that he did it by raising his arms. (App. D-2, D-3).

Upon observing the admonishment and the damaging of the sign, Officers Arthur and Ground caught up to Barlow and requested that he step to the sidewalk. Barlow refused to cooperate and dropped to the ground in the parade route. The officers took Barlow by the arms but he resisted their efforts to move him. The officers continually requested that Barlow accompany them out of the parade route. When Barlow continued to violently resist, other officers were required to assist in forcibly removing him from the street. Barlow bit Officer Ground and Officer Raymond Shay as they sought to overcome his resistance. Both bites pierced the skin and drew blood. (App., D-3, D-4).

Barlow was subsequently handcuffed, placed in a police car and transported to a local hospital for examination. At the hospital, Barlow stated that he was a homosexual. When asked if he had A.I.D.S., he replied "For the officers' sake, you better take it that I do." Out of concern for the bitten officers' safety and well being, Barlow was asked to provide a blood sample for testing for the A.I.D.S. virus. When he refused, a blood sample was taken at the police station over his objection, but without force, in a medically approved manner. (App., D-4).

A second blood sample was taken pursuant to a search warrant prepared at the request of the District Attorney's Office and issued by a Judge. A Motion to Quash the search warrant was denied by a Judge who, after a lengthy hearing, found probable cause for the issuance of the search warrant. The District Attorney's Motion to Allow Testing of the Blood was granted. (App. D-5).

The District Attorney charged Barlow with two counts of violation of California Penal Code section 243(c)(felony battery on a police officer causing injury), and one count of violation of Penal Code section 148 (resisting, delaying, or obstructing a police officer). A preliminary hearing was held and Barlow was bound over for trial on all counts. (App. D-5).

Barlow was acquitted of the criminal charges in a jury trial and subsequently filed this lawsuit for deprivation of civil rights under 42 U.S.C. § 1983, invoking jurisdiction of the District Court pursuant to 28 U.S.C. §§ 1331 and 1343. He alleges unlawful search and seizure under the Fourth Amendment claiming that the arrest was without probable cause, that excessive force was used and that the taking of blood samples was unreasonable.

Petitioners were granted summary judgment at the District Court on all issues as set forth in the Memorandum Decision attached as Appendix "D". The Court found that reasonable suspicion existed for the detention, that probable cause existed for the arrest, and that qualified immunity applied to the arrest and detention. The Court further found that qualified immunity applied to the taking of the first blood sample without a warrant because it was not clearly unconstitutional to do so in view of an apparent medical emergency, that immunity applied to the taking of the second sample pursuant to a valid search warrant, and that no evidence was presented in opposition to the motion on the issue of excessive force.

The Ninth Circuit Court of Appeal reversed on all issues except that it affirmed the District Court's judgment as to immunity for the second seizure of blood pursuant to a valid search warrant.

## REASONS FOR GRANTING THE WRIT

Petitioners are entitled to summary judgment on qualified immunity grounds if "a reasonable officer could have believed [Barlow's detention, arrest, and the taking of a blood sample to test for the A.I.D.S. virus] to be lawful,

in light of clearly established law and the information the officers possessed." Anderson v. Creighton, 483 U.S. 635, 641 (1987). In turn, Barlow's detention was lawful if "the facts available to the officer at the moment of the seizure ... [would] 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." Terry v. Ohio, 392 U.S. 1 (1968). Barlow's arrest was lawful if "the facts and circumstances ... were sufficient to warrant a prudent man in believing that [Barlow] had [committed battery or vandalism under California law]." Beck v. Ohio, 379 U.S. 89, 91 (1964). Also, the taking of a blood sample without a warrant to test for the A.I.D.S. virus was lawful if needed "to protect or preserve life or avoid serious injury," if the search is "strictly circumscribed by the exigencies which justify its initiation." Mincey v. Arizona, 437 U.S. 385 (1978).

Although portions of the Ninth Circuit's opinion correctly set out some of the general legal principles, the court's analysis directly contravenes decisions of this Court by applying its own standards. The court not only fails to properly apply an objective standard to the detention and arrest, but clearly misapplies the qualified immunity standard

in all respects. Rather than determining whether reasonable officers in petitioners' position could have interpreted the facts and circumstances as they did (with regard to the detention and arrest), the court held that Barlow's version of "accidental" contact with the sign prevented summary judgment on those issues. Not only is that "subjective" approach improper for analysis under Terry or Beck, it ignores this Court's clear statement of the law to be applied to claims of qualified immunity.

Further, in examining the issue of the taking of a blood sample without a warrant, the court opined that the arresting officers should have known in June, 1986, that no medical technique could have reversed or retarded an A.I.D.S. infection caused by a bite and that therefore no Mincey exigency existed; and that qualified immunity is a question of fact for the jury, which is to decide "whether a reasonable officer would have realized there was time to procure a warrant." This analysis plainly ignores the decisions of this court regarding petitioners' right to qualified immunity. It requires petitioners to have had knowledge, in June 1986, of evolving medical literature, rather than knowledge of existing law. It is noteworthy that the court in its opinion

references medical literature published in 1987 and 1989, both after the date of the subject incident.

The error in the court's rationale is so plain we urge that the decision of the Ninth Circuit be summarily reversed and the judgment of the District Court be reinstated.

**1. Detention and Arrest**

Police officers sued for damages under 42 U.S.C. § 1983 are entitled to assert the defense of qualified immunity. Malley v. Briggs, 475 U.S. 335 (1986); Harlow v. Fitzgerald, 457 U.S. 800 (1982). Qualified immunity is available if officers of reasonable competence could disagree on the issues of reasonable suspicion to detain or probable cause to arrest. It is unavailable only if no reasonably competent officer would have found reasonable suspicion or probable cause on the information the officers possessed. Malley v. Briggs, 475 U.S. 335, 341 (1986). Even law enforcement officers who "reasonably but mistakenly conclude that probable cause is present" are entitled to immunity. Anderson v. Creighton, 483 U.S. 635, 641 (1987). Moreover, because "[t]he entitlement is an immunity from suit rather than a mere defense to liability," Mitchell v. Forsyth, 472 U.S. 511, 526 (1985), the

immunity question should be decided by the court at the earliest possible stage in litigation. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The court should ask whether officers "acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed ... after the fact." Hunter v. Bryant, 502 U.S. ___, 116 L.Ed 2D 589, 596 (1991). The Ninth Circuit's statement of the doctrine of qualified immunity is incorrect. The court states: "Summary judgment is therefore appropriate only if the officers are entitled to judgment on the basis of the facts most favorable to Barlow." (App., B-15). Barlow's later explanation that he knocked down the sign "accidentally" changes none of "the information the officers possessed" at the time of the detention and arrest. The court's reasoning here is the same reasoning that was found to be in error in Hunter v. Bryant, supra, that summary judgment is proper only if there is one reasonable conclusion a jury could reach. Here, as in Hunter, the Ninth Circuit would have the question of immunity routinely placed in the hands of the jury.

The undisputed facts in this case establish that

petitioners are entitled to qualified immunity, if not an outright finding of a lawful detention and arrest. Under the Fourth Amendment, an individual may be contacted and detained for suspicious activity that does not amount to probable cause to arrest. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). To detain a suspect, a police officer must have an articulable suspicion that the person has committed or is about to commit a crime. U.S. v. Woods, 720 F.2d 1022, 1026 (9th Cir. 1983). In evaluating the officer's conduct, a court uses an objective standard. It must ask, "would the facts available to the officer at the moment of the seizure ... 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry, 88 S.Ct. at 1880.

The existence of probable cause depends on an assessment of "whether at [the moment the arrest was made] the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [the person arrested] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964). Accord Carroll v. United States, 267 U.S. 132, 162

(1925).

Officers Ground and Arthur watched Barlow being admonished for spraying parade protesters from a water bottle. They observed that he was staring at the sky in an arrogant manner during the admonishment apparently ignoring Officer Oberlies, and they watched as he knocked down a protester's sign as he ran back into the parade. In the words of the victim, Mrs. Skinner: "He grabbed my sign, ripped it off the stick, and threw it to the ground. I had not seen him coming and there was plenty of room to walk between us without touching us." The officers clearly had reasonable suspicion that Barlow had committed battery and vandalism, based on the articulable facts that he knocked down a protester's sign in these circumstances, regardless of his later innocent explanation. In any event, the sign incident would almost certainly have led at least some reasonably competent officers to conclude that a detention was appropriate, as the District Court found. (App., D-11). Further, the subsequent resistance and biting of two police officers would lead any reasonably competent police to conclude that probable cause existed to arrest. (App., D-11).

The ultimate determinant is whether the decisions of the officers were reasonable, even if mistaken. "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law." Hunter, supra, at 596, citing Malley, supra at 343. This accommodation for reasonable error exists because "officials should not err always on the side of caution" because they fear being sued. Davis v. Sherer, 468 U.S. 183 (1989). In the present case, the District Court properly followed the qualified immunity doctrine. This is precisely the type of case for which the immunity is intended. Officers were attempting to control a volatile situation involving conflict between parade participants and protesters. Officers acted reasonably in attempting to remove from the parade an individual who they observed committed an offense and who, by all appearances, was intentionally trying to provoke disorder. There is no question that qualified immunity applies and the decision of the Ninth Circuit must be reversed.

**2. Blood Sample**

The opinion of the Ninth Circuit holds that the taking of the first blood sample from plaintiff was per se unreasonable

and that it was clearly established at the time that seizure was unconstitutional. The qualified immunity issue as applied here is one of exceptional importance, and the Ninth Circuit's reversal of the District Court's finding of immunity conflicts with decisions of this Court and alters a rule for which national uniformity is required.

This Court has recognized that police officers can proceed without a warrant where they are confronted with a medical emergency. The "need to protect or preserve life or avoid serious injury is justification for what would otherwise be [an] illegal [search] absent an exigency or emergency." Mincey v. Arizona, 437 U.S. 385, 392-393 (1978). Thus, it is clearly constitutional to carry out a warrantless search where a medical emergency exists.

In the present case, it is undisputed that appellant bit two police officers, drawing blood, and that appellant admitted being homosexual and indicated that he might have AIDS. It is also undisputed that AIDS is a deadly, highly contagious disease, of epidemic proportions that is transmitted by exchange of bodily fluids. (See California Health and Safety Code §§ 199.45, 199.46, 199.55, 199.95). Based on lengthy medical testimony presented in a trial

court, the court in Johnetta J. v. Municipal Court, 218 Cal.App.3d 1255, 1283 (1990), concluded that, "in the unique circumstances of the AIDS epidemic, medical opinion cannot rule out the possibility of H.I.V. transfer to an officer suffering a bite."

The Ninth Circuit's opinion on this issue is based on its finding that no medical technique could have reversed or retarded the AIDS infection and that therefore no Mincey emergency existed. (App., B-24 to B-26). However, analysis of qualified immunity calls for knowledge of existing law, not existing medical literature as the court suggests. It is noteworthy that the medical literature which the court references was published in 1987 (Green, "The Transmission of AIDS") and 1989 (Center for Disease Control Guidelines for Prevention of Transmission"),, both after the June, 1986, incident which is the subject of this appeal. Even today, common knowledge of AIDS is varied and uncertain. In 1986, very little was known about the virus at all even within the medical profession.

It is irrelevant to an objective determination of qualified immunity the extent of the officers' knowledge of the available treatment for AIDS exposure or of the state of

medical or pharmacological technology regarding the AIDS virus. At the time of the underlying incident, an apparent exposure to a deadly virus by transmission of bodily fluids had occurred. The qualified immunity is intended for precisely this type of uncertainty. It was incumbent upon the officers at the time to obtain a blood sample promptly and to allow the bitten officers and their physicians the opportunity to take whatever medical precaution that might be available to safeguard their health and to limit the risk to their families.

Such a test could not have been per se unconstitutional at the time of this event. The minimal intrusion of taking a blood sample, without force, simply to test for the presence of the AIDS virus, must be balanced against the officers' reasonable and good faith belief that it would be helpful "to protect or preserve life or avoid serious injury..."

The refusal of the Ninth Circuit to apply qualified immunity under these facts ignores the reasoning of this Court in establishing the immunity as set forth in petitioner's argument on the detention and arrest, supra.

Here again, the Ninth Circuit leaves qualified immunity to the jury, which is to decide "whether a reasonable officer

would have realized that there was time to procure a warrant." This reasoning is clearly in error. Petitioners believed in good faith that a medical emergency existed which required firm and expeditious action. Re-examination of this issue by this Writ is essential because it is an issue of exceptional importance to all law enforcement personnel in area of legal and medical uncertainty. Petitioners again request that the judgment of the Ninth Circuit be summarily reversed and the judgment of the District Court be reinstated as a correct application of the principles of qualified immunity.

3. Force Used

Barlow presented no evidence in opposition to summary judgment on the issue of excessive force (See Memorandum Decision and Order, App., D-12 to D-14). Also, where qualified immunity is an issue, it must be decided on summary judgment. Where there is nothing in the record that indicates that more force than necessary was used or that any injury occurred, summary judgment must be granted on qualified immunity grounds. White by White v. Pierce County, 797 F.2d 812, 816 (9th Cir. 1986).

The Ninth Circuit's holding that the reasonableness of

force is a question for the jury is based on their erroneous conclusion that the detention was unlawful as discussed supra. The Court reasons that since the jury could find that Barlow accidentally knocked down the sign, they could find that excessive force was used solely because the detention was unlawful.

Again, the court ignores the Skinners' evidence and fails to properly consider the issue of qualified immunity. The only evidence presented at summary judgment was that Barlow violently resisted the officers' lawful attempt to detain him and remove him from the path of an ongoing parade that he was disrupting. Some force was necessary to overcome Barlow's resistance and no evidence was presented by Barlow as to his claim of no resistance or as to any pain until his motion for reconsideration in District Court, which was denied. The Ninth Circuit opinion appears to refer to evidence presented by Barlow in seeking reconsideration by the District Court.

The District Court denied the motion for reconsideration (App., C-1) since the evidence submitted was not "newly discovered" evidence as required by Federal Rules of Civil Procedure Rules 59 and 60. Inclusion of such evidence in

de novo review of summary judgment is improper and is in direct conflict with Rules 59 and 60.

The judgment of the Ninth Circuit is clearly erroneous on the issue of excessive force and qualified immunity thereon based on the record of the evidence presented at summary judgment. Again, the judgment of the Ninth Circuit on this issue should be summarily reversed and the judgment of the District Court reinstated.

## CONCLUSION

The petition for writ of certiorari should be granted and the Court should summarily reverse on the grounds that undisputed facts establish petitioners' entitlement to summary judgment on all issues on qualified immunity grounds or on the grounds of the existence a lawful detention, arrest, and seizure of blood and the lack of evidence of unreasonable force, as set forth herein.

In the alternative, the Court should reverse and remand to the Court of Appeal, with instructions to apply appropriate legal standards and analysis in regard to petitioners' claims of qualified immunity.

Dated: April 27, 1992

Respectfully submitted,

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By James M. Chapin
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Attorneys for Petitioners
George Ground, Raymond Shay,
Leslie Oberlies, James
Arthur, Robert Evans and
The City of San Diego

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| BRIAN BARLOW, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | No. 90-55819 |
| | ) | |
| v. | ) | D.C. No. |
| | ) | CV-88-1841-JLI |
| OFFICER GEORGE GROUND, I.D. #9129, et al., | ) | ORDER |
| | ) | |
| Defendants-Appellees. | ) | |
| | ) | |

Before: PREGERSON, BRUNETTI, AND T. G. NELSON, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested an en banc hearing. Federal Rule 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

[Filed February 5, 1992]

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| BRIAN BARLOW, Plaintiff-Appellant, | No. 90-55819 |
| v. | D.C. No. CV-88-1841-JLI |
| OFFICER GEORGE GROUND I.D.#9129, et al., Defendants-Appellees. | OPINION |

Appeal from the United States District
Court for the Southern District
of California
J. Lawrence Irving, District Judge,
Presiding

Argued and Submitted
May 16, 1991 - Pasadena, California

Filed September 5, 1991

Before: Harry Pregerson, Melvin Brunetti
and Thomas G. Nelson, Circuit Judges.

Opinion by Judge Pregerson

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## SUMMARY

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**CONSTITUTIONAL LAW/SEARCH AND SEIZURE**

Affirming in part, reversing in part and remanding a

district court grant of summary judgment, the court of appeals held that police did not have probable cause to arrest appellant and that a subsequent warrantless draw of his blood for AIDS testing was a violation of the fourth amendment. [12393]

Appellant Brian Barlow was marching in a Gay Pride Parade in San Diego when he was arrested by police for knocking down a sign carried by an anti-gay heckler. After admitting during interrogation that he was gay, Barlow was then asked by police whether he had AIDS. Police then took a blood sample without Barlow's consent and without a warrant. Subsequently, police obtained a warrant authorizing a second seizure of blood. Later, police obtained an order authorizing the testing of the blood sample for AIDS. The California Court of Appeals held that the warrant authorizing the collection of the second blood sample was invalid for lack of probable cause. The California Supreme Court denied review and ordered the appellate opinion depublished. Neither blood sample was ever tested. A jury unanimously acquitted Barlow of the criminal charges. He then filed a section 1983 suit, alleging, among other things, a violation of his constitutional

rights. The district court granted summary judgment for all defendants.

[1] The court held that the district court improperly granted summary judgment on the issue of the propriety of the detention and arrest of Barlow, the reasonableness of the force used, the availability of qualified immunity, and the question whether Barlow could recover as damages the expenses he incurred in his successful defense against the criminal charges. [2] The district court improperly believed that police had grounds to detain Barlow because they claimed they saw him knock down the sign carried by the anti-gay protester. According to Barlow, this was entirely accidental. An independent witness confirmed that Barlow bumped into the sign accidentally. [3] Assuming Barlow's version to be true, the court could not say as a matter of law that the officers reasonably suspected that Barlow had committed a crime. Summary judgment was thus improper on the detention issue.

[4] The disputed facts that prevented resolution of the detention issue on summary judgment also prevented resolution of the question whether police had probable cause to [12394]

arrest. [5] Given Barlow's version, a reasonable jury could conclude that Barlow was arrested before he began struggling with the officers, and was thus arrested solely for accidentally bumping into a protest sign. If this was in fact what happened, the jury could reasonably conclude that police did not have probable cause to arrest Barlow.

[6] Even if the parties agreed on the amount of force that was applied in this case, the question whether that force was reasonable could not properly have been resolved on summary judgment. The same factual disputes underlying the detention and arrest issues were relevant in determining whether police used reasonable force. From Barlow's testimony, a reasonable jury could conclude that even if police did have probable cause to arrest him, they nevertheless applied excessive force. Consequently, the district court erred in granting summary judgment on this issue also.

[7] The doctrine of qualified immunity does not apply if reasonable officers would have known that they were violating clearly established constitutional rights. Summary judgment on this issue was therefore appropriate only if the officers were entitled to judgment on the basis of the facts

most favorable to Barlow. However, that was not the case here. Barlow's version of the facts suggested that no reasonable officer could have believed there was probable cause to arrest or that the amount of force used against Barlow was justified.

[8] A plaintiff who proves that police arrested him without probable cause is entitled to compensation, including reasonable attorneys' fees, for the economic and non-economic damages he incurs as a proximate result of these violations, unless the prosecutor's decision to file charges is such an independent judgment that it must be considered the proximate cause of the subsequent criminal proceedings. [9] Here, the district court erred in holding, as a matter of law, that Barlow could not recover the money spent on defending against [12395]
the criminal charges. There was ample evidence from which a reasonable jury could conclude that the arresting officers, through false statements and material omissions in their reports, prevented the prosecutor from exercising independent judgment.

[10] Next, the court considered whether the seizing of Barlow's blood fell under one of the specific exceptions to

the warrant requirement. [11] The court agreed that, here, the HIV antibodies, if present were not evanescent. Because there was no chance that the information police sought would disappear with the passage of time, Schmerber did not permit the warrantless taking of blood to test for HIV. [12] In addition, the delay caused by waiting to obtain a warrant could not have caused or compounded any harm. Therefore, the exigent circumstances exception did not apply. Therefore, because the warrantless search did not fall under a specifically established and well-delineated exception, it was per se unreasonable.

[13] The district court erred in resolving the issue of qualified immunity on a motion for summary judgment. The district court held that qualified immunity applied because a reasonable officer could have believed that a warrantless extraction of blood from Barlow was lawful if necessary to protect the officers' health and safety. [14] A jury must decide whether a reasonable officer would have realized that there was time to procure a warrant.

[15] A police officer generally has qualified immunity for conducting an unconstitutional search if he is acting on the basis of a facially valid warrant. The court believed

that, in this case, a reasonably well-trained officer could have believed that the warrant obtained was valid. Therefore, the officers' second seizure of Barlow's blood was protected by qualified immunity. [12396]

## COUNSEL

Thomas F. Homann, and George Weingarten, San Diego California, for the plaintiff-appellant.

James M. Chapin, Deputy City Attorney, San Diego, California, for the defendants-appellees.

## OPINION

PREGERSON, Circuit Judge:

Brian Barlow sued George Ground, other San Diego police officers and the City of San Diego. He alleged violations of constitutional rights under 42 U.S.C. § 1983 as well as state law claims of assault and battery, false arrest, and negligent supervision. The district court granted summary judgment in favor of the defendants. We reverse in part and affirm in part.

### I

On June 7, 1986, Brian Barlow marched in a Gay Pride

Parade in San Diego. Several San Diego police officers were assigned to monitor the parade, which drew a sizable contingent of anti-gay hecklers. After an interchange between Barlow and the police, the facts of which are in dispute, a struggle ensued and Barlow was taken into custody. During the scuffle, Barlow bit two of the officers, drawing blood. Barlow was charged with two counts of battery against a police officer and one count of obstructing a police officer.

Police took Barlow to the hospital for treatment of injuries he sustained during the arrest. In response to police questioning at the hospital, Barlow acknowledged that he is gay. The police then asked Barlow if he had AIDS. He said no. Police asked again and received the same reply. Finally, after contin- [12397]
ued questioning, Barlow said, "for the officers' sake, you better take it that I do [have AIDS]."

The officers then asked permission to take Barlow's blood so they could test it for AIDS. Barlow refused to consent. Police then took Barlow to the San Diego Police Department, where they took a blood sample without consent and without a warrant.

After this warrantless seizing of Barlow's blood, police sought a warrant that would grant them authority to seize a second sample and test it for AIDS. The warrant police obtained authorize a second seizure, but did not authorize testing. Pursuant to the warrant, police then took a second sample of Barlow's blood.

Later, police obtained an order authorizing them to test the second blood sample. The California Court of Appeals held that the warrant authorizing the collection of the second blood sample was invalid for lack of probable cause. The California Supreme Court denied review and ordered the appellate decision depublished. Neither blood sample was ever tested.

A jury unanimously acquitted Barlow of the criminal charges. He then filed this suit in state court. The defendants removed the case to the federal district court. The district court granted the defendants' motion for summary judgment, and Barlow filed this timely appeal.

II

We review de novo a grant of summary judgment. Darring v. Kincheloe, 783 F.2d 874, 876 (9th Cir. 1986). Summary judgment is proper where "there is no genuine

issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We reverse a grant of summary judgment if, viewing the evidence in the light most favorable to the non-moving party, there are genu- [12398]
ine issues of material fact or if the district court erroneously applied the relevant law. Tzung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir. 1989).

III

[1] We consider first the issues arising out of Barlow's arrest at the parade. We hold that the district court improperly granted summary judgment to the defendants on the issue of the propriety of the detention and arrest of Barlow, the reasonableness of the force used, the availability of qualified immunity, and the question whether Barlow can recover as damages the expenses he incurred in his successful defense against the criminal charges.

A

The district court held that on the basis of the undisputed facts, the officers had proper grounds to detain Barlow and probable cause to arrest him. We disagree.

The fourth amendment permits police to detain an

individual only if they have an articulate and reasonable suspicion that the individual has committed or is about to commit a crime. United States v. Woods, 720 F.2d 1022, 1026 (9th Cir. 1983). To arrest an individual, police need more than a reasonable suspicion; they must have probable cause. Probable cause to arrest exists when "under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime." United States v. Smith, 790 F.2d 789, 792 (9th Cir. 1986).

[2] The district court believed that police had grounds to detain Barlow because they claimed they saw him knock down a sign carried by an anti-gay protester. According to Barlow, however, his contact with the sign was entirely accidental. He said it came into his path as he walked past the pro- [12399]
testers and he merely put his hand up to cover his face. An independent witness confirmed that Barlow bumped into the sign accidentally.

[3] For summary judgment purposes, we must accept Barlow's version of the incident as true and determine whether the defendants are nevertheless entitled to judgment

as a matter of law. Assuming Barlow's version to be true, we cannot say as a matter of law that the officers reasonably suspected that Barlow had committed a crime. Summary judgment was thus improper on the detention issue.

[4] The disputed facts that prevent resolution of the detention issue on summary judgment also prevent resolution of the question whether police had probable cause to arrest. Moreover, there are additional factual disputes as to whether the arrest took place before or after Barlow began struggling with the officers.

[5] According to Barlow, police tackled him from behind as he was rejoining his section of the parade. He immediately felt "incredible pain" in his back. In reaction to the pain, he said, he fought back to defend himself. Given Barlow's version, a reasonable jury could conclude that Barlow was arrested before he began struggling with the officers and was thus arrested solely for accidentally bumping into a protest sign. If this is in fact what happened, the jury could reasonably conclude that police did not have probable cause to arrest Barlow.

B

The district court also granted summary judgment on

Barlow's claim that the officers used excessive force in arresting him.

An arrest is a seizure that is governed by the reasonableness standard of the fourth amendment. In determining whether the [12400]
degree of force is reasonable under the fourth amendment, courts carefully balance the nature and quality of the intrusion against the governmental interest at stake. Graham v. Conner, 490 U.S. 386, 396 (1989). Such a balancing "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether he is "actively resisting arrest or attempting to evade arrest by flight." Id. The inquiry is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them ...." Id. at 1872, citing Scott v. United States, 436 U.S. 128, 137-39 (1978). Whether the amount of force used was reasonable is usually a question of fact to be determined by the jury. White v. Pierce County, 797 F.2d 812, 816 (9th Cir. 1986).

[6] Even if the parties agreed on the amount of force

that was applied in this case, the question whether that force was reasonable could not properly be resolved on summary judgment. In this case, the same factual disputes that underlie the detention and arrest issues are relevant to determining whether police used reasonable force. Viewing the evidence in the light most favorable to Barlow, a reasonable jury could conclude that Barlow was tackled from behind and placed in an extremely punishing "pain compliance" hold solely for accidentally bumping into a demonstrator's placard. Moreover, a reasonable jury could conclude that even if police did have probable cause to arrest Barlow, they nevertheless applied excessive force. Throwing down a sign is not a severe crime and Barlow's actions in self-defense did not pose a threat to the officers until after they placed the "pain compliance" hold on him. Consequently, the district court erred by granting summary judgment on the excessive force issue.

C

The district court also held that even if police did not have probable cause to arrest Barlow, and even if excessive force [12401]

was used, the officers are nonetheless immune from civil

damages under the doctrine of qualified immunity. The district court accordingly granted summary judgment to the defendants on this issue as well.

[7] The doctrine of qualified immunity does not apply if reasonable officers would have known they were violating clearly established Constitutional rights. See White v. Pierce County, 797 F.2d 812, 815 (9th Cir. 1986). In the present case, facts necessary to decide the issue of qualified immunity are in dispute. Summary judgment is therefore appropriate only if the officers are entitled to judgment on the basis of the facts most favorable to Barlow. That is not the case here. Barlow's version of the facts suggest that no reasonable officer could have believed there was probable cause to arrest or that the amount of force used against Barlow was justified. Summary judgment was therefore inappropriate.

D

Barlow argues that as part of his damages for unlawful arrest, he should be entitled to recover the fees he paid his attorney for handling his successful defense of the criminal charges filed against him. He contends that these fees are part of the economic damages proximately caused by the

officers' unlawful act of arresting him without probable cause. The district court held, as a matter of law, that the money he spent on his defense was not recoverable even if Barlow were successful in proving false arrest or a violation of the fourth amendment. According to the district court, if the expenses of the defense are to be considered damages, the proximate cause is not the officers, but the prosecutor, who independently decided to bring the charges. We disagree.

[8] A plaintiff who proves that police arrested him without probable cause is entitled to compensation for the economic and non-economic damages he incurs as a proximate result of these violations. Borunda v. Richmond, 885 F.2d 1384, 1389 [12402] (9th Cir. 1988). Reasonable attorney's fees incurred by the plaintiff can constitute part of the foreseeable economic damages, unless the prosecutor's decision to file charges is such an independent judgment that it must be considered the proximate cause of the subsequent criminal proceedings. Id. at 1389-90.

Thus, the police officers can be liable for the costs of Barlow's defense if they acted maliciously or with reckless

disregard for his rights. See Smiddy v. Varney, 665 F.2d 261, 267 (9th Cir. 1981), cert. denied, 459 U.S. 829 (1982). They can also be liable if they made false reports to the prosecutor, omitted material information from the reports, or otherwise prevented the prosecutor from exercising independent judgment. Borunda, 885 F.2d at 1390.

The evidence in Borunda was more than sufficient to support a finding that the prosecutor did not exercise the sort of independent judgment that would cut off the officers' liability for the full consequences, including compensation for legal defense, of making an arrest without probable cause. The prosecutor's only information came from the police reports. There were glaring omissions from the reports; the officers presented contradictory accounts of the incident in court; and independent witnesses confirmed the plaintiffs' version of the arrest. Given any of these circumstances, the jury was clearly entitled to conclude that the officers misrepresented the facts to the prosecutor and that these misrepresen-

tations were responsible for the filing of the criminal complaint. In such a case, we concluded in Borunda, the jury can conclude that the fees incurred in defending against

the criminal charges are the direct and foreseeable result of the officers' conduct. Id. at 1390.

[9] Barlow can present similar facts in this case. First, the prosecutor had only the arresting officers' police reports available to him. Second, the police omitted crucial information. For example, they failed to mention in their reports

that [12403]

they gave Barlow no Miranda warnings before questioning him about AIDS. Third, an independent witness confirmed Barlow's account of the sign incident, which was not presented in the police reports. Finally, the jury is entitled to consider the fact that the police themselves offer contradictory accounts of the arrest. In this case, therefore, the district court erred by ruling, as a matter of law, that Barlow cannot recover the money he spent defending against the criminal charges. There is ample evidence from which a reasonable jury could conclude that the arresting officers, through false statements and material omissions in their reports, prevented the prosecutor from exercising independent judgment.

IV

We now consider the constitutional issues arising from the two seizures of Barlow's blood. We conclude that police violated the fourth amendment by seizing the first blood sample without a warrant. We further conclude that the district court erred in holding, as a matter of law, that defendants are protected by qualified immunity from liability for this warrantless seizure. Finally, we affirm the district court's judgment that defendants are entitled to qualified immunity for the second seizure of blood, which was pursuant to a facially valid warrant.

A

Intrusions into the human body, including the taking of blood, are searches subject to the restrictions of the fourth amendment. Schmerber v. California, 384 U.S. 757, 766-68 (1966). The Supreme Court has reaffirmed the "cardinal principle" that "'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions.'" California v. Acevedo, 111 S. Ct. 1982, 1991 (1991), quoting Mincey v. Arizona, 437 U.S. 385, 390 (1978) [12404]

Accordingly, the first seizure of Barlow's blood is valid only if the circumstances fit one of the exceptions to the rule that warrantless searches are unreasonable.

1

An analysis of the constitutionality of seizing Barlow's blood requires an understanding of AIDS, the Human Immunodefiency Virus (HIV) that causes AIDS, and the medical tests that are available to detect the presence of HIV. See generally, Green, "The Transmission of AIDS," in AIDS and the Law 28-31 (H. Dalton & S. Burris eds. 1987). Although the presence of the virus leads eventually to the fatal condition known as AIDS, the process may take a long time. Carriers of the virus may remain in perfect health for many years. Although they have not yet developed AIDS, they are capable of infecting others with the virus.

HIV is "transmitted only through the exchange of semen or cervical or vaginal secretions during sexual contact, from transfusions of blood products that have been contaminated with the virus, by the shared use of hypodermic needles that have been contaminated, and between an infected pregnant woman and her fetus." Green, supra, at 28. Of 85,000

AIDS cases documented, none have resulted from a bite by an infected person. See Johnetta J. v. Municipal Court, 218 Cal.App.3d 1255, 1269 (Ct. App. 1990). According to the Center for Disease Control, the potential for transmitting the virus by saliva is "remote." United States Department of Human and Health Services, Center for Disease Control, "Guidelines for Prevention of Transmission of Human Immunodeficiency Virus and Hepatitus-B Virus to Health-Care and Public-Safety Workers," 10 (Feb. 1989).

When a person becomes infected with HIV, the body eventually manufactures antibodies. It is these antibodies that blood tests detect. Because it takes several months before the body manufactures these antibodies, a person may carry the [12405]
virus for several months without showing up as HIV positive in a blood test. Thus a negative blood test does not necessarily indicate the absence of the virus. On the other hand, when a positive blood test reveals the presence of HIV antibodies, and hence the presence of HIV, the infected person is likely to develop AIDS eventually. Infected individuals who develop HIV antibodies retain those antibodies in their blood for the rest of their lives.

2

[10] We next examine whether the seizing of Barlow's blood falls under one of the specific exceptions to the warrant requirement. One exception that comes to mind was approved by the Supreme Court in Schmerber v. California, 384 U.S. 757 (1966). In Schmerber, the police had probable cause to arrest the defendant for driving under the influence of alcohol. The police then compelled him to provide blood samples to determine the percentage of alcohol in his blood. Because the percentage of alcohol in a person's blood begins to decline as soon as he stops drinking, the police needed to take the blood immediately to accurately measure the alcohol level at the time of the alleged offense. Because the delay necessary to obtain a warrant threatened the loss of the evidence, the Court upheld the warrantless seizure of blood. Schmerber, 384 U.S. at 770-71.

[11] The Schmerber exception to the warrant requirement does not apply in this case. Unlike the evidence in Schmerber, the evidence here is not so "evanescent" that it would disappear before a warrant could be obtained. If an infected person has not yet developed antibodies to HIV, the

blood will yield no useful information, because a negative blood test does not rule out the possibility of an infection. On the other hand, once a person has developed HIV antibodies, they remain a permanent feature of the infected person's blood. A slight delay in testing will not lead to the destruction of the information sought. In Graves v. Beto, 424 F.2d 524, 525 (5th Cir. [12406]
1970), cert. denied, 400 U.S. 960 (1970), the Fifth Circuit held that Schmerber did not permit a warrantless search for evidence that was not evanescent. We agree. The HIV antibodies, even if they are present, are not evanescent. Because there was no chance that the information police sought would disappear with the passage of time, Schmerber does not permit the warrantless taking of blood to test for HIV.

3

In Mincey v. Arizona, 437 U.S. 385 (1978), the Supreme Court recognized that exigent circumstances may sometimes justify a warrantless search. Police officers can proceed without a warrant if they reasonably believe they are confronted with an emergency that threatens life or limb. The Court said that the "need to protect or preserve life or

avoid serious injury is justification for what would otherwise be [an] illegal [search] absent an exigency or emergency." Id. at 392-93. It noted, however, that the search must be "strictly circumscribed by the exigencies which justify its initiation." Id. at 393.

[12] Even if Barlow was infected with HIV, it is highly unlikely that he could transmit the virus by biting. Moreover, even if such transmission were a realistic possibility, the officers could not decrease or increase the risk to their health by forcing an immediate nonconsensual blood test. Unfortunately, if the bite did infect the officers, there is no medical technique to reverse or retard the infection. It makes no difference to the officers' health whether Barlow was tested immediately, without a warrant, or a short time later pursuant to a warrant. The crux of the exigent circumstances exception is that officer or others may be harmed if the officer does not act immediately. In this case, the delay caused by waiting to obtain a warrant could not have caused or compounded any harm. Therefore, the exigent circumstances exception does not apply. [12407]

In sum, because the information was not evanescent and waiting for a warrant could neither compound the dangers

nor aggravate the medical consequences, neither Schmerber nor the exigent circumstances exception applies to the present case. Thus, because the warrantless search does not fall under a specifically established and well-delineated exception, it is per se unreasonable.

B

[13] Defendants argue that even if they violated the Constitution by taking Barlow's blood without a warrant, qualified immunity shields them from liability for damages. The district court found that qualified immunity applies because "a reasonable officer could have believed that a warrantless extraction of blood from plaintiff was lawful if necessary to protect the officers' health and safety." We hold that the district court erred by resolving this issue of qualified immunity on a motion for summary judgment.

Qualified immunity from civil liability can extend to officials who perform allegedly unlawful warrantless searches. Anderson v. Creighton, 483 U.S. 635, 643 (1987). "The relevant inquiry is whether a reasonable government official could have believed his conduct was lawful, in light of clearly established law and the information he possessed." Thorsted v. Kelly, 858 F.2d 571, 573 (9th

Cir. 1988), citing Anderson, 483 U.S. at 641.

The threshold question, which is a question of law, is "[w]hether at the time of the challenged action the legal norm allegedly violated by an official was clearly established." Brady v. Gebbie, 859 F.2d 1543, 1556 (9th Cir. 1988), cert. denied, 459 U.S. 1100 (1989). As the analysis in part IV.A. of this opinion demonstrates, Barlow has raised a genuine issue of material fact whether the warrantless seizure of his blood violated fourth amendment principles that were clearly established at the time.

[12408]

[14] The subsequent question is for the jury. It must decide "[w]hether a reasonable official would know that she is violating that clearly established law." Id. In the present case, the jury must decide whether a reasonable officer would have realized that there was time to procure a warrant. The district court erred by resolving this jury question on a motion for summary judgment.

C

Barlow also seeks damages for the second seizure of his blood, which police effected pursuant to a warrant that a California appellate court later ruled was invalid. On

appeal, defendants do not argue that the second seizure complied with the requirements of the fourth amendment. They contend, however, that the district court correctly ruled that they were entitled to qualified immunity. We agree.

[15] A police officer generally has qualified immunity for conducting an unconstitutional search if he is acting on the basis of a facially valid warrant. Malley v. Briggs, 475 U.S. 335, 344 n.6 (1986). Immunity does not protect the officer, however, if no reasonably competent officer would have concluded that a warrant should issue. Id. at 346 n.9. In this case, we believe that a reasonably well-trained officer could have believed that the warrant was valid.

V

The district court's Memorandum Decision and Order does not discuss Barlow's state law claims. We assume that they are still in the case and will be addressed by the district court on remand.

VI

The judgment of the district court is reversed in part and affirmed in part, and this case is remanded for further pro-

[12409]

ceedings consistent with this opinion. Costs on appeal are

awarded to the appellant. [12410]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF CALIFORNIA**

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|---|---|
| BRIAN BARLOW,<br><br>Plaintiff,<br><br>v.<br><br>OFFICER GEORGE GROUND, et al.,<br><br>Defendants. | Civil<br>88-1841-JLI(M)<br><br>MEMORANDUM DECISION AND ORDER |

Plaintiff's motion for reconsideration of the Court's previous order granting summary judgment came on for hearing before the Honorable J. Lawrence Irving, District Judge. George Weingarten appeared on behalf of the plaintiff. James Chapin appeared on behalf of the defendants. At that time, the matter was taken under submission.

Having considered all pleadings, declarations[1], audio-visual evidence[2] and the written and oral arguments of counsel and law in support thereof, the Court denies

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[1]The Court examined in detail the newly submitted declarations of Brian Barlow, plaintiff, and Officer Arthur, defendant.

[2]The Court also carefully examined plaintiff's newly submitted video tape of the parade incident.

plaintiff's motion in its [1] entirety.

In particular, the Court finds that:

1. Defendants are immune from liability for the alleged use of excessive force. The video tape of the incident, viewed in the light most favorable to plaintiff, indicates that plaintiff resisted the officers' attempts to detain him and that the officers utilized reasonable force to detain him. Accordingly, there is no triable issue of fact on this issue.

2. Defendants are immune from liability for extraction of the first blood sample since plaintiff has failed to establish that their conduct violated clearly established statutory or constitutional rights.

IT IS SO ORDERED.

DATED:

J. LAWRENCE IRVING, JUDGE
UNITED STATES DISTRICT COURT

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[2]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| BRIAN BARLOW,<br><br>Plaintiff,<br><br>v.<br><br>OFFICER GEORGE GROUND, et al.,<br><br>Defendants. | Civil No. 88-01841-JLI(M)<br><br>MEMORANDUM DECISION AND ORDER |

Defendants' motion for summary judgment came on for hearing December 4, 1989, at 10:30 a.m. before the Honorable J. Lawrence Irving, District Judge. George Weingarten appeared on behalf of the plaintiff. James Chapin appeared on behalf of the defendants. At that time, the matter was taken under submission.

Having considered all pleadings, declarations and the written and oral arguments of counsel and law in support thereof, the Court grants defendants' motion for summary judgment.

## I. BACKGROUND

Brian Barlow, plaintiff was arrested on June 7, 1986 by officers of the San Diego Police Department. On October 26, 1988 he filed an action in state court against various San

Diego [1]

officers and the City for deprivation of civil rights (42 U.S.C. §1983), assault and battery, false arrest, negligence, and negligent supervision. The action was removed to this Court on December 2, 1988.

At bar, defendants move for summary judgment.

## II. STATEMENT OF FACTS

Plaintiff was participating in a gay rights parade in San Diego on June 7, 1986. According to both parties, plaintiff was contacted by Officer Oberlies after he had received complaints from bystanders that plaintiff had been spraying them with water from a bottle he was carrying. Plaintiff was admonished and released back into the parade. According to Officer Ground, who witnessed the admonishment, plaintiff seemed to have ignored Officer Oberlies as he was speaking.

The events thereafter are somewhat in dispute. According to numerous defendants and their witnesses, as plaintiff ran back into the street, he grabbed a sign from a young female protester, tore the sign off the stick, threw the sign to the ground, and ran to catch up with the rest of his

unit[1].

According to plaintiff and his witness, the sign was protruding out into the street and plaintiff accidentally knocked [2] his hand against it as he returned to the parade[2].

Thereafter, both parties agree that Officers Arthur and Ground requested that plaintiff step to the side of the street. Plaintiff refused to cooperate with the officers and dropped to the ground when the officers took him by the arms. Officer Arthur yanked plaintiff up using his baton in a compliance hold. Once plaintiff was up, he made an attempt

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[1]Officer Arthur, Michelle Skinner (the protester) and Colin Skinner (her husband) testified to this exact statement. Officer Ground testified on one occasion that plaintiff grabbed, "more or less," the sign of a protester, hit her and returned to his unit. On another occasion the officer states that while plaintiff was returning to the parade his left hand pushed two protesters out of the way, knocking their signs out of their hands.

[2]Jody Kissin testified that the sign was sticking out in the street and that plaintiff "made a gesture with his hands like he was throwing up his hands or he was standing up, and his hands went up and he hit the sign." She did not see plaintiff grab the sign, throw the sign or hit the woman with the sign. Plaintiff testified that a sign came into his path, he pulled his arms up and walked on after having had contact with the sign.

to get away. Even though Officer Arthur still had a hold on plaintiff, Officer Ground came over and, presumably because of plaintiff's attempted escape, forced him back to the ground to handcuff him.

At this point, plaintiff bit Officer Ground and Officer Shay, who had stepped in to help. Both bites pierced the skin and drew blood.

Plaintiff was subsequently handcuffed, placed in a police car and transported to a local hospital for examination. At the hospital, Officer Arthur, without administering Miranda warnings, asked plaintiff whether he has homosexual. When plaintiff answered affirmatively, Officer Arthur repeatedly asked plaintiff if he had AIDS. Plaintiff repeatedly replied no and then finally stated, "for the officers' sake, you better take it that I do."

Thereafter, a blood sample was taken from plaintiff at the police station without his consent and in a medically approved [3] manner[3]. On July 11, 1988, a second sample was taken at

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[3]The record simply states that "a blood sample was taken from plaintiff at the police station." It does not indicate which officers, besides Officer Arthur, actually made and executed the decision to test plaintiff's blood for AIDS.

the police station pursuant to a search warrant. The warrant was requested by Deputy District Attorney Barret, prepared by Officer Evans and issued by Judge Guy-Schall. A hearing on a Motion to Quash the warrant was held before Judge Raymond Edwards. The Judge denied the motion rejecting the argument that failure to Mirandize eviscerated probable cause. On appeal, the California Appellate Court held that the affidavit in support of the warrant lacked probable cause. The California Supreme Court denied review of this decision and ordered it depublished.

The prosecutor charged plaintiff with two counts of battery against a police officer, Ca. Penal Code §243(c), and one count of obstructing a police officer, Ca. Penal Code §148. Plaintiff was acquitted.

## III. DISCUSSION

### A. Standard of Review

In order to grant summary judgment the Court must find that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. F.R.C.P. Rule 56(c). It is the moving party's burden to

establish that he is entitled summary judgment. F.R.C.P. Rule 56(c); British Airways Board v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978), cert. den'd, 440 U.S. 981 (1979), reh'g den'd, 441 U.S. 968 (1979). If this burden is met, the adverse party must set forth sufficient specific facts so that a rational juror could reasonably find in [4] his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2512 (1986).

B. Detention and Arrest of Plaintiff

1. Detention

Defendants argue that the detention of plaintiff was reasonable and appropriate under the circumstances. Plaintiff argues that the detention was unreasonable.

An individual's right to be free from an unlawful arrest or detention is a liberty interest protected by the Constitution and federal laws, the violation of which may give rise to a §1983 action. McKenzie v. Lamb, 738 F.2d 1005, 7 (9th Cir. 1984). Under the Fourth Amendment, an individual may be contacted and detained for suspicious activity that does not amount to probable cause to arrest. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). To detain a suspect, a police officer must have an articulable suspicion that the

person has committed or is about to commit a crime. U.S. v. Woods, 720 F.2d 1022, 1026 (9th Cir. 1983). In evaluating the officer's conduct, a court uses an objective standard. It must ask, "would the facts available to the officer at the moment of the seizure ... 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry, 88 S.Ct. at 1880. Finally, in determining whether an investigatory detention is necessary, conduct that alone may appear innocent can be suspicious when viewed in the context of other information or surrounding circumstances that the police are aware of. Guam v. Ichiyasu, 838 F.2d 353, 355-6 (9th Cir. 1988).

Defendants argue that Officers Arthur and Ground had reasonable suspicion to detain plaintiff for battery, Ca. Penal [5]
Code § 242, and vandalism, Ca. Penal Code § 594, since: 1. plaintiff had been admonished by another police officer for conduct amounting to battery on parade protesters; 2. plaintiff seemingly ignored the officer's admonitions; and 3. plaintiff was seen grabbing and damaging a protestor's sign as he ran back to the parade.

Plaintiff does not dispute defendants' first two grounds

for reasonable suspicion. He claims, however, that there is a genuine issue of fact as to whether plaintiff grabbed the sign from the protester or just accidentally touched it.

Accepting plaintiff's assertion as true, the police officers would still have had grounds for detention. It is undisputed that plaintiff hit the sign, inadvertently or not, and that the sign fell to the ground. This fact, coupled with the prior admonition to plaintiff, rendered the plaintiff's conduct suspicious and worthy of further investigation.

In summary, therefore, the Court finds that the officers did have reasonable, articulable suspicions to detain plaintiff based on his conduct.

2. Arrest

Defendants argue that probable cause existed to arrest plaintiff. Plaintiff argues the opposite.

The test for probable cause to arrest is whether the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe that the suspect has committed, is committing, or is about to commit an offense. U.S. v. Greene, 783 F.2d 1364, 1367 (9th Cir. 1986), cert. den'd, 476 U.S. 1185 (1986). [6]

Defendants argue that the police had probable cause to

arrest plaintiff for battery and vandalism based on their three noted observations but chose to detain plaintiff for those violations rather than arrest him. They argue that they had probable cause to arrest plaintiff for battery against a police officer and obstructing a police officer once plaintiff actively resisted the officers attempt to detain him and bit two of them while resisting.

Plaintiff does not dispute the resistance or biting.

Accordingly, therefore, the Court finds that the officers did have probable cause to arrest the plaintiff since they had sufficient knowledge to conclude that a crime was committed.

3. Immunity

Defendants further argue that they are protected by a qualified immunity when they perform discretionary functions such as detaining or arresting suspects. Plaintiff argues that immunity is unavailable since the officers' conduct clearly violated his constitutional rights.

Police officers have a qualified immunity under § 1983 shielding them from liability if they reasonably believe, in good faith, that their actions are constitutional. Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981), cert. den'd, 459

U.S. 829 (1982). To recover, therefore, plaintiff must clear two hurdles: 1. reasonable suspicion for the detention and probable cause for the arrest must be shown not to have existed; 2. the officers must be shown not to have reasonably believed in good faith that reasonable suspicion and probable cause did exist. Id.; Hutchinson v. Grant, 796 F.2d 288, 290 (9th Cir. 1986). The test for qualified immunity is quite simple. [7]

Qualified immunity is available if officers of reasonable competence could disagree on the issue of reasonable suspicion or probable cause. It is unavailable if no reasonably competent officer would have found probable cause or reasonable suspicion. Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 1096 (1986). Qualified immunity is also unavailable if the officers conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 2738 (1982).

Defendants argue first, that the officers did make a lawful detention and arrest. As noted supra, § B.1.-2., the Court agrees.

Defendants further argue that any reasonably competent

officer would have detained and arrested plaintiff after observing the commission of a battery, the resistance to the detention and the subsequent biting of two police officers.

Defendants are correct. The sign incident would almost certainly have led at least some competent officers to conclude that reasonable suspicion existed to detain the plaintiff. The resistance and biting would certainly have led any competent officer to conclude that probable cause existed to arrest the plaintiff.

Plaintiff makes a "creative" counterargument: "[s]ince the officers can't reasonably be saying that they were unaware of the Fourth Amendment, they can't claim the qualified immunity defense." In order to overcome a claim of immunity, the plaintiff must show that the defendant violated particular legal norms that were clearly established at the time of the challenged actions. Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 2815-6 (1985). [8] Plaintiff has made no such showing.

Accordingly, defendant is entitled to qualified immunity as to their detention and arrest of plaintiff.

C. Force Used to Detain and Arrest Plaintiff

1. Reasonableness of Force Used

Defendants argue that they utilized reasonable force in effecting plaintiff's detention and arrest. Plaintiff argues that reasonable use of force is automatically a question of fact which precludes summary judgment.

The use of excessive force in an arrest violates the arrestee's Fourth Amendment right to be free from unreasonable seizure. White by White v. Pierce County, 797 F.2d 812, 816 (9th Cir. 1986). A police officer may use reasonable force to effectuate an arrest, Ca. Penal Code §§835, 835(a), and to effectuate a detention. U.S. v. Jacobs, 715 F.2d 1343, 1345-6 (9th Cir. 1983); U.S. v. Bautista, 684 F.2d 1286, 1289 (9th Cir. 1982), cert. den'd, 459 U.S. 1211 (1983).

Defendants argue that plaintiff resisted the officers attempt to remove him from the parade path and detain him. Accordingly, force was necessary to overcome plaintiff's resistance.

Plaintiff does not set forth any facts to dispute defendants' assertions. Instead he cites Graham v. Connor, _ U.S. _____, 109 S.Ct. 1865, 104 L.Ed.2d 443, 454 (1989)(claims of excessive force must be examined under Fourth Amendment reasonableness standard, rather than

under a substantive due process approach) and claims that reasonableness of force is a question of fact that must be decided by a jury. Plaintiff misunderstands his burden on a summary judgment motion. Since the defendants have met their [9]

burden of establishing entitlement to summary judgment, the plaintiff is obliged to set forth sufficient specific facts so that a rational juror could reasonably find in his favor. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2512 (1986). Plaintiff has made no such showing.

Accordingly, defendants are entitled to summary judgment on the issue of excessive force.

2. Immunity

Defendants argue further that a qualified immunity also protects officers accused of excessive force. Plaintiff does not address this issue.

Police officers are not civilly liable if they act upon a reasonable belief that the amount of force they used is reasonable under the circumstances. Graham, 104 L.Ed.2d at 457 n. 12, White by White, 797 F.2d at 816.

Defendants argue that: the officers had reasonable grounds for the detention; plaintiff resisted; and the officers

reasonably believed that force was necessary in order to maintain the detention and later arrest.

Plaintiff fails to articulate any facts challenging the officers' reasonable belief that force was necessary.

Accordingly, the officers are entitled to immunity for their use of force in detaining and arresting plaintiff.

D. Proximate Causation

Defendants argue that plaintiff cannot recover his costs for defending himself in the criminal trial since the prosecutor exercised independent judgment in filing the criminal charges thus breaking the chain of causation between their acts and plaintiff's [10] damages. Plaintiff argues that the prosecutor did not exercise independent judgment.

Assuming that probable cause to detain and arrest was absent, an officer is generally insulated from liability arising subsequent to the unlawful arrest since the prosecutor filing the charge is presumed to have exercised independent judgment in determining that probable cause existed. Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981), cert. den'd, 459 U.S. 829 (1982); Borunda v. Richmond, 885 F.2d 1384, 1390 (9th Cir. 1989). This presumption can be

rebutted, however, by evidence that the investigating officers caused the prosecutor to act contrary to his independent judgment, or made material omissions or gave false information to the prosecutor. Id. For example, the Borunda court held that the following evidence was sufficient to rebut a presumption of prosecutorial independence: 1. the prosecutor had no information available to him other than the police report filed by the arresting officers; 2. there were striking omissions from the police report; and 3. the police officers gave markedly different accounts of the alleged incident. Borunda, 885 F.2d at 1390.

Plaintiff argues that the prosecutor did not exercise independent judgment since: 1. the prosecutor only reviewed the arresting officers police reports; 2. the police report failed to advise the prosecutor that no Miranda warnings were given to plaintiff prior to his statement re: AIDS; and 3. the police report failed to advise the prosecutor that the AIDS question was asked of and denied by plaintiff numerous times before it was admitted.

Plaintiff's first argument is mistaken. District Attorney Barret declares that he not only reviewed the police report but

that he also contacted Detective Robert Evans, who was independently investigating the case.

As for plaintiff's second argument, defendants note that the prosecutor was informed that Miranda warnings were not given and actually litigated this issue in the Motion to Quash. Thus, there was no omission or false information regarding this matter.

The omission alluded to in plaintiff's third argument is not material. The number of times plaintiff was asked whether or not he had AIDS would not have been a decisive factor for a prosecutor to consider before proceeding to prosecute plaintiff criminally.

Finally, the police officers in the case at bar gave quite similar accounts of the alleged incident.

Thus, the presumption of prosecutorial independence has not been rebutted and defendants are therefore insulated from liability for damages arising subsequent to the filing of criminal charges.

E. Extraction of Blood Sample

1. First Blood Sample

Defendants argue that the officers' good faith belief in the appropriateness and necessity of taking blood from

plaintiff immunizes them from civil immunity. Plaintiff argues that qualified immunity is unavailable for the officers since their conduct violated clearly established law.

Qualified immunity from civil liability extends to officials who conduct allegedly unlawful warrantless searches. Anderson v. Creighton, 483 U.S.635, 107 S.Ct. 3034, 3041 (1987). "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of [12] which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 2738 (1982).

The relevant question is whether a reasonable officer could have believed that the warrantless search was lawful in light of clearly established law and the information the searching officers possessed. Anderson, 107 S.Ct. at 3040.

"Officials are charged with knowledge of constitutional developments at the time of the alleged ... violation, including all available case law." Lum v. Jensen, 876 F.2d 1385, 1387 (9th Cir. 1989). To determine whether a right is clearly established the Court must first examine Ninth Circuit authority. Absent binding circuit authority, the

Court must look at other available decisional law and evaluate the likelihood that the Ninth Circuit or the Supreme Court would have reached the same result. Id.

a. Extraction of Blood for Use as Evidence

Defendants argue that as of June, 1986, it was not clearly established that it was unconstitutional for police officers to take a blood sample from a suspect who had bitten two police officers where: 1. probable cause existed to believe the suspect had AIDS; and 2. the preservation of AIDS evidence was necessary in order to determine the appropriate criminal charges against the plaintiff. Without citation of authority, they argue that blood tests are common practices for prosecuting a variety of alcohol and drug-related offenses[4]. [13]

Defendants' argument has merit. In Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966) the Court held that, under the Fourth Amendment, a defendant could

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[4]Defendants also state that since the legality of the second blood test was litigated all the way to the California Supreme Court, the legality of the first blood test was obviously unsettled. This is not persuasive. The issue with respect to the second blood sample was the legality of the search warrant. The issue with respect to the first blood sample is the legality of the warrantless search.

be compelled to provide blood samples for proving his blood alcohol percentage where there was probable cause to arrest him for driving under the influence. A warrantless blood sample was permissible, inter alia, since the officer could reasonably believe that the delay necessary to obtain the warrant threatened the destruction of evidence. Id. at 1835-1836.

A warrantless blood test for evidence is unlawful, however, where the nature of the evidence sought was not so evanescent that it could have been destroyed or otherwise disappear before a warrant could be obtained. Graves v. Beto, 424 F.2d 524 (5th Cir. 1970), cert. den'd, 400 U.S. 960 (1970), is on point. In Graves, the police had probable cause to believe that the defendant had committed a rape. Since some blood had been found on the victim's bed covers, the police obtained a warrantless blood test from the defendant in order to determine his blood type and match his blood to that of the bed covers. The court held that the search was not within the ambit of Schmerber. The defendant's blood type was not evanescent evidence; "it would remain the same no matter how long it took to secure a warrant." Id. at 525.

The Ninth Circuit would be likely to follow the logic of Graves. In at least two similar contexts, the Circuit has held that evidence cannot be seized without a warrant in the absence of some emergency justifying immediate seizure. U.S. v. Cameron, 538 [14] F.2d 254, 259 (9th Cir. 1976)(rectal cavity search at border); Bouse v. Bussey, 573 F.2d 548, 550 (9th Cir. 1977)(pubic hair search in county jail).

In summary, in June, 1986, it was clearly established that a warrantless blood sample could not be obtained unless the evidence sought was evanescent. At bar, there is no evidence before the Court from which it can conclude that any purported evidence of AIDS in plaintiff's bloodstream would have disappeared or been destroyed before the police could obtain a search warrant. Accordingly, defendants cannot maintain their immunity on Schmerber grounds.

b. Extraction of Blood to Protect Defendants' Health

Defendants can maintain their immunity on alternative grounds, however. Although not raised in their motion, defendants can argue that extraction of blood from plaintiff was necessary in order to protect the health and safety of the

officers who were bitten[5]. For purposes of immunity, thus, the argument is: as of June, 1986, it was not clearly unconstitutional for police officers to extract a blood sample from a suspect who had bitten them and indicated that he had AIDS, if the sample was obtained to protect the health and safety of the injured officers.

It is well established law that a police officer may perform a warrantless search if he is confronted with an emergency situation in which he reasonably and in good faith concludes that substantial risk of harm to himself or others exists. The Supreme [15]
Court has recognized that "the need to protect or preserve life or avoid serious injury is justification for what would otherwise be [an] illegal [search] absent an exigency or emergency." Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 2413 (1978). It noted, however, that the search must be strictly circumscribed by the exigencies which justify its initiation." Id.

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[5]According to trial testimony of Officer Arthur, after plaintiff intimated that he might have AIDS, Arthur was "concerned for the [injured] officers' safety and sake." Shortly thereafter the first blood sample was extracted from plaintiff.

The Ninth Circuit's decision in U.S. v. Mayes, 670 F.2d 126 (9th Cir. 1982) is analogous to the case at bar. Here, defendant's daughter was hospitalized in critical condition because a wad of tissue paper had somehow been lodged in her throat. The Doctor felt that it was imperative to examine the object that had caused the injury in part because he feared that some of the tissue might have gone into the child's lungs and in part because he suspected the possibility of child abuse. Accordingly, a Navy Corpsman, acting on the instructions of the Doctor, performed a warrantless search of the house and retrieved the tissue. The court held that such circumstances were sufficient to satisfy the emergency exception to the Fourth Amendment's search warrant requirement. "In such circumstances," it stated, "it would be unreasonable to require the doctor to apply ... for a search warrant. In life threatening situations minutes and seconds are precious." Id. at 128. Moreover, "[t]he fact that [the Doctor] also suspected the possibility of criminal conduct [did] not detract from the emergency." Id.

Mayes, of course, does not squarely jibe with the facts in this case. Mayes applies to the search of a residence. Plaintiff's search involved an intrusion into his body, a much

more intrusive search. [16]

This fact notwithstanding, this Court believes that under Mincey and Mayes, it cannot be said that there was clearly established law that prohibited defendants' conduct. Like the situation in Mayes, the officers who ordered the blood test believed that their fellow officers were in a potentially life threatening situation that necessitated immediate action. The injured officers had just been bitten by a man who stated that he might have had AIDS. Under these circumstances, the officers who ordered the blood test reasonably believed that, in order to safeguard the injured officers' health, they had to immediately confirm whether or not plaintiff had AIDS and, if so, inform the injured officers so that they could take whatever medical precautions they could to prevent their infection. The extraction of a blood sample in a medically approved fashion was a reasonable and, under the circumstances, sufficiently circumscribed manner to protect the injured officers' health. That the officers sought to utilize the blood results in deciding how to charge plaintiff would not detract from what they perceived, and what an objective person would perceive, as an emergency.

In summary, in June, 1986 a reasonable officer could

have believed that a warrantless extraction of blood from plaintiff was lawful if necessary to protect the officers' health and safety. Accordingly, defendants can maintain immunity on Mincey/Mayes grounds.

c. Extraction of Blood Sample as a Violation of State Law

Plaintiff argues that the first blood test was done in clear violation of California Health and Safety Code §199.20. Section 199.20 provides, in pertinent part: [17]

> [N]o person shall be compelled in any state, county, city or other local civil, criminal...or other proceedings to identify or provide identifying characteristics which would identify any individual who is the subject of a blood test to detect antibodies to the probable causative agent of AIDS.

Plaintiff's reliance on this section, however, is misplaced. Section 199.20 prohibits compelled identification of test subjects. At bar the issue is whether or not the officers had a right to test the plaintiff's blood.

Plaintiff's general argument is not meritless, however. Section 199.22 of the California Health and Safety Code plainly prohibits nonconsensual testing for AIDS. Section 199.22(a)(effective April 4, 1985) stated, in relevant part:

> No person shall test a person's blood for evidence of antibodies to the probable causative agent of

> AIDS without the written consent of the subject of the test, and the person giving the test shall have a written statement signed by the subject confirming that he or she obtained the consent from the subject.

Thus, defendants conduct in June, 1986 clearly violated the §199.22 prohibition.

This violation, however, does not conclusively bar defendants' qualified immunity. "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory ... provision." Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012, 3019 (1984), reh'g den'd, 468 U.S. 1226 (1984). If immunity was barred every time an official violated a state statute, "officials would be liable in an indeterminate amount for violation of any constitutional right--one that was not clearly defined or perhaps not even foreshadowed at the time of the [18] alleged violation...." Id.

Thus, the court has limited those circumstances under which statutory violations nullify immunity.

> [N]either federal nor state officials lose their immunity by violating the clear command of a statute or regulation-of federal or of state law-unless the statute or regulation provides the basis for the cause of action sued upon.

104 S.Ct. at 3019 n.12.

The test, it stated, is whether the statute itself authorizes a cause of action for damages or provides a basis for an action brought under §1983[6]. Id.

At bar, neither the statute nor the statutory scheme authorize a cause of action for damages if non-consensual AIDS blood testing is performed[7]. Ca. Health and Safety Code §199.20 et. seq.

Moreover, violation of the California statutory prohibition would not provide a basis for an action under §1983. A violation of state law can serve as the basis of a

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[6]In Davis the plaintiff filed a §1983 action claiming that the Florida Highway Patrol violated due process by terminating him without a formal pre-termination or post-termination hearing. The district court held that the defendants had forfeited their qualified immunity since they had violated the clear command of a state regulation requiring complete investigation of charges filed against an officer and an opportunity for the officer to respond in writing. Davis, 104 S.Ct. at 3015-3016. The Supreme Court reversed. Immunity was still available since there was no claim by the plaintiff that the state regulation or the laws that authorized its promulgation created a cause of action for damages or provided the basis for an action brought under §1983. Id. at 3019 n.12.

[7]There is, however, a cause of action for unauthorized disclosure of AIDS blood tests. Ca. Health and Safety Code §199.21.

§1983 action "[w]here the violation of state law causes the deprivation of rights protected by the Constitution and statutes of the United States." Draper v. [19] Coombs, 792 F.2d 915, 921 (9th Cir. 1986). In Draper, for example, the plaintiff was allowed to file a §1983 action for violation of an Oregon extradition statute since the state statute was "designed to implement the extradition clause of the United States Constitution." Id. At bar, unlike Draper, plaintiff could not claim that §199.22 was designed to implement some specific federal constitutional or statutory right. Thus, violation of the California statutory prohibition could not be the basis of a §1983 action.

Accordingly, since §199.22 does not provide the basis for plaintiff's cause of action, defendants' violation of §199.22 does not vitiate their qualified immunity.

In summary, the Court finds that defendants are immune from civil liability for extraction of the first blood sample since their conduct did not violate clearly established law.

2. Second Blood Test

a. Immunity

Defendants argue that they are not liable for damages for the extraction of the second blood sample since it was

obtained pursuant to a judicially approved search warrant. Plaintiff argues that immunity is unavailable since the officer knew that his affidavit failed to establish probable cause.

An officer whose request for a warrant allegedly causes an unconstitutional search has a qualified immunity. Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 1097 n.6, 1098 (1986); Ortiz v. Van Auken, 887 F.2d 1366 (9th Cir. 1989). The Malley court states:

> [W]here a magistrate acts mistakenly in issuing a warrant but within the range of professional [20] competence of a magistrate, the officer who requested the warrant cannot be held liable. But it is different if no officer of reasonable competence would have requested the warrant. [In this case] [t]he officer cannot excuse his own default by pointing to the greater incompetence of the magistrate. Id. at 1098-9 n. 9.

The test for immunity is whether a reasonably well trained officer in the defendant's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. Id. at 1098. If so, the officer is not entitled to immunity.

Defendants argue that probable cause was found by one judge who examined the affidavit and by another judge after a full hearing on the issue. Hence, they should be absolved from liability.

Plaintiff makes a somewhat confusing counterargument. The basic thrust of his argument is that: 1. Officer Evans knew that Miranda warnings were not given to plaintiff before he made his incriminating remarks re: AIDS; 2. the officer failed to include this fact in his affidavit since he knew it would obviate probable cause at the outset; and 3. thus, the officer is not entitled to immunity since he knew his affidavit failed to establish probable cause.

Plaintiff's argument is flawed in two respects. First, it is not a foregone conclusion that that arresting officers' failure to Mirandize plaintiff would have obviated probable cause. In fact, the judge who reviewed the Motion to Quash considered the lack of Miranda warnings and allowed the warrant to stand anyway.

Second, it cannot be said no officer of reasonable [21] competence would have requested the warrant without making reference to the lack of Miranda warnings. A reasonably competent officer might have concluded, for example, that Miranda warnings were unnecessary under the public safety exception to Miranda. See New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626 (1984).

b. Proximate Causation

Defendant reiterates that plaintiff cannot recover the costs he incurred in litigating the second blood test issue since the chain of causation between the declarant officer and the damages suffered by plaintiff was broken by the intervening acts of the prosecutor and the judges. Plaintiff argues that the intervening acts were the product of deception or that the entire issue is precluded by previous criminal proceedings.

The intervening acts of a prosecutor or a judge break the chain of causation from a post-complaint injury to an officer unless a plaintiff can show that the intervening acts were the result of deception or undue pressure by the officers. Barts v. Joyner, 865 F.2d 1187, 1195 (11th Cir. 1989), cert. den'd, ___ U.S. ___, 110 S.Ct. 101 (1989); Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981), cert. den'd, 459 U.S. 829 (1982).

Defendants argue that the chain of causation was broken since: 1. the decision to seek the warrant and litigate its validity was made by the prosecutor; and 2. two separate judges approved the warrant.

Plaintiff has a twofold response. First, he seems to argue that Officer Evans was guilty of deception in not

revealing the lack of Miranda warnings in his affidavit. For the reasons stated supra, § D., the Court finds that the prosecutor's and judges' acts - [22] were not the product of deception and that immunity stands.

Second, plaintiff claims that the California Appellate Court Decision should be given preclusive effect with respect to the chain of causation issue before this Court. To apply collateral estoppel, the issues in question must be identical. Shapley v. Nevada Board of State Prison Commissioners, 766 F.2d 404, 408 (9th Cir. 1985). The issues here plainly are not. In the State Court proceeding the issue was whether the search warrant was valid. The issue in this Court is whether the chain of causation from the act of the officer seeking the search warrant to the damage suffered by plaintiff had been broken by an intervening act.

Thus, the Court finds that the intervening acts of both the prosecutor and judges broke the chain of causation and insulate the officer from liability for damages arising subsequent to the prosecutor's decision to seek the search warrant.

E. Liability of the City

Defendants argue that plaintiff's general allegations against the City (i.e. that the City failed to adequately train, supervise or control defendants and thus proximately caused plaintiff's injuries) are insufficient to create a cause of action against the City. Plaintiff argues the opposite.

Municipalities can be held liable under §1983 for constitutional violations caused by their official policies and unwritten customs. Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 2035-2036 (1978). Municipalities cannot, however, be held responsible solely on a theory of respondeat superior. Id. at 2036. "Instead, it is when execution of a government's policy or custom...by those whose [23] edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." Id. at 2037. Generally speaking, allegations of a single incident of unconstitutional conduct by an employee does not establish a sufficient basis for suing a city. Strauss v. City of Chicago, 760 F.2d 765, 767 (7th Cir. 1985) and cases cited therein.

Inadequacy of policy training may serve as the basis for §1983 liability where failure to train amounts to a deliberate

indifference. Canton v. Harris, __ U.S. _____, 109 S.Ct. 1197, 103 L.Ed.2d 412, 426 (1989). To resolve this issue the focus must be on the adequacy of the training program in relation to the tasks that the particular officer must perform. Id. at 428. The identified deficiency in the training program must be closely related to the ultimate injury. Id. Finally, it is insufficient to prove that an injury or accident could have been avoided only if an officer had had better training since such a claim does not implicate the adequacy of the entire program and since even adequately trained officers occasionally make mistakes. Id.

Plaintiff makes four separate allegations to support his claim of inadequate training/supervision. First, in his Complaint plaintiff alleges that there have been numerous complaints of excessive force against the defendants and that the City has failed to act on these complaints. The defendants set forth evidence which proves that none of the defendants have been the subject of citizen complaints regarding excessive force. Since plaintiff offers no rebuttal, this issue is not in material dispute.

Second, in his Opposition plaintiff alleges that Officer Arthur never mentioned in his police report that he failed

to [24]

administer Miranda warnings to Plaintiff. Moreover, Arthur stated that he had no intention to arrest Barlow for the sign incident, but eventually did arrest him. Accepting these allegations as true, they are still insufficient, as a matter of law, to create liability. First, plaintiff makes no showing that this conduct, even if assumed to be wrongful, is anything more than the isolated conduct of one officer. He submits no evidence to prove that this conduct was part of municipal policy or custom. Second, there is no way in which these two stated deficiencies could be closely connected with plaintiff's ultimate injuries. Plaintiff seeks damages based on false arrest, false detention, excessive force and improper submission to blood testing. A failure to notate lack of Miranda rights or an officers belief that he was not going to arrest plaintiff for one offense but later arrests him for another do not bare on these issues.

Third, plaintiff alleges that during the altercation between plaintiff and defendants: Officer Arthur yanked Plaintiff up from the ground; Officer Arthur had plaintiff in full control; Officer Ground had no idea what was going on and in thinking it was easier to handcuff plaintiff on the

ground, proceeded to force him to the ground again. Accepting these allegations as true they also are insufficient, as a matter of law, to create liability. First, plaintiff makes no showing that this conduct is anything other than an isolated incident. Second, to create liability for inadequate training, it is insufficient to prove that an injury could have been avoided if an officer had had better training. "Adequately trained officers sometimes make mistakes; the fact that they do says little about the training program or the legal basis for [25]

holding [a] city liable." Id.

## IV. CONCLUSION

The Court grants defendants' motion for summary judgment in its entirety.

The Court finds that:

1. There is no genuine issue of material fact regarding the lawfulness of plaintiff's detention and arrest. Moreover, there is no genuine issue of material fact regarding the officers' qualified immunity for their conduct.

2. There is no genuine issue of material fact regarding the reasonableness of the force utilized by the officers to detain the arrest the plaintiff. Moreover, there is no genuine issue

of material fact regarding the officers' qualified immunity for their conduct.

3. There is no genuine issue of material fact regarding the prosecutor's independent judgment in determining that probable cause existed and in filing criminal charges against plaintiff. Thus, defendants are not liable for any damages incurred by plaintiff after the prosecutor filed criminal charges.

4. Defendants are immune from liability for extraction of the first blood sample since plaintiff has failed to establish that their conduct violated clearly established statutory or constitutional rights.

Defendants are immune from liability for extraction of the second blood sample since it was properly obtained pursuant to a judicially approved search warrant. Moreover, the intervening acts of both the prosecutor and the judges broke the chain of causation and insulate defendants from civil liability. [26]

5. Plaintiff has failed to set forth any facts that would establish that the City had a policy or custom that proximately caused plaintiff's injuries. Thus, the City cannot be held liable for any of the alleged constitutional

violations caused by the police officers.

IT IS SO ORDERED.

Dated: December 14, 1989

J. LAWRENCE IRVING, JUDGE
UNITED STATES DISTRICT COURT

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[27]

No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

**CERTIFICATE OF SERVICE**

I, James M. Chapin, declare that I am, and was at the time of service of the papers herein referred to, am the attorney of record in the within action, and am a member of the bar of this Court, representing Petitioners George Ground, Raymond Shay, Leslie Oberlies, James Arthur, Robert Evans, and the City of San Diego. I am a citizen of the United States, over the age of 18, and not a party to the within action. My business address is 525 "B" Street, Suite 2100, San Diego, California 92101.

On April 28, 1992, I served the **Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Ninth Circuit** on the following by placing one copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

George Weingarten, Esq.
1125 West Olive Street
San Diego, CA 92103

Stephen M. Kelly, Clerk
Court of Appeal
Fourth District, Division One
750 "B" Street, Suite 5000
San Diego, CA 92101

I thereafter sealed and deposited such envelope in a United States mailbox with first-class postage prepaid.

I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct. Executed this 28 day of April, 1992, in San Diego, California.

James M. Chapin
Declarant